Supreme Court, U.S.
FILED
(1)
021361 MAR 14 2003
OFFICE OF THE CLERK

No

In the Supreme Court of the United States

EDSON MAITLAND,

Petitioner,

v.

PITNEY BOWES COPIER SYSTEMS,
A DIVISION OF PITNEY BOWES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

1. The finding of the courts below that Petitioner's claim pursuant to the Americans with Disabilities Act failed as a matter of law was inconsistent with decisions of this Court and of other United States Courts of Appeal.

2. The finding of the courts below that Petitioner's claim of race discrimination failed as a matter of law was inconsistent with decisions of this Court and of other United States Courts of Appeal.

3. The finding of the courts below that Petitioner's claim of retaliation failed as a matter of law was inconsistent with decisions of this Court and of other United States Courts of Appeal.

LIST OF PARTIES

Petitioner

The Petitioner, Edson Maitland, has no corporate affiliations.

Respondent

The Respondent is Pitney Bowes Copier Systems, a division of Pitney Bowes, Inc.

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Petitioner respectfully petitions for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Bench Decision of the United States District Court for the Eastern District of New York is unreported and is reproduced in the Appendix. The Summary Order of the United States Court of Appeals for the Second Circuit is unreported and is reproduced in the Appendix.

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was rendered on December 20, 2002. No rehearing was requested.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Americans with Disabilities Act, 42 U.S.C. §12112(a), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*.

42 U.S.C. §2000e-2(a) provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex,

or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. §12112(a) provides:

"(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment."

STATEMENT OF THE CASE

A. Relevant Facts

Petitioner is a member of the black race.

In or about October, 1986, Petitioner became employed by Respondent as a Customer Service Representative Trainee. After successfully completing his training, which included how to fix copiers, Petitioner served

for one to two years as an Associate Customer Service Representative repairing copiers. Petitioner then became a Customer Service Representative, a title that he continued to hold. Petitioner continued repairing copiers and eventually fax machines.

Other than serving for a time as a Customer Service Trainee in Manhattan, Petitioner, until 1998, was assigned to Respondent's Queens District Office. Respondent's Queens District Office covers Queens, Brooklyn, Staten Island, the Bronx and upper Manhattan. Within the Queens District, Petitioner was assigned a particular borough, to wit: Brooklyn, except upon his return from disability leave in June, 1997, when he was assigned to the Borough of Queens.

Between 1991 and 1995, while assigned to the Queens District Office, Petitioner's immediate supervisor was Lenny Sterling, Copier Field Manager. In 1995, Jose Cividanes, Copier Field Manager, became Petitioner's supervisor and remained Petitioner's supervisor until 1998. Petitioner's second line supervisor during these years and the individual to whom Jose Cividanes and Lenny Sterling reported was Russ Pagano, District Manager. Mr. Pagano is Italian and Caucasian. Mr. Cividanes is Hispanic.

Between 1986 and 1993, Petitioner resided in Brooklyn, New York. In 1993, he moved to Nassau County.

Upon Petitioner's return from a second period of disability, in December, 1998, he was assigned to the Huntington, New York District Office. Petitioner's Field Manager then became Chris Owens, who is Caucasian.

During his employment with Respondent, Petitioner's job performance was satisfactory. He received numerous letters of commendation and is qualified for all relevant positions held and sought. Most of these awards and

commendations occurred before 1995. After 1995, Petitioner received one letter recognizing him for ten (10) years of service.

Beginning in or about 1995 and continuing thereafter, Respondent and its employees, including, but not limited to, Messrs. Pagano and Cividanes, began engaging in a series of actions, inactions and statements with the intent to discriminate against Petitioner because of his race, disability and as retaliation for engaging in protected activity.

In 1995, Petitioner was approached by Bob Nappi, a Senior Customer Service Representative, who also served as a Junior Manager, taking over in the absence of the Manager. Mr. Nappi then stated to Petitioner "What's happening, Nigger?" At this time, Mr. Nappi, a Caucasian, also stated that "God didn't create all men equal, because you don't understand that a black man's dick is bigger than a white man's dick." Petitioner immediately reported these remarks to higher management. He reported them to Mr. Sterling, Pat Kelly and Russ Pagano. Mr. Cividanes, who was present when Petitioner reported it to Mr. Sterling, stated that he did not see anything wrong with Mr. Nappi's statement. At the time, Mr. Cividanes was a Senior Service Representative and had some managerial duties.

Petitioner then advised Mr. Pagano of Mr. Nappi's and Mr. Cividanes' statements. All Mr. Pagano did was to call a meeting with the Customer Service Representatives and advised Petitioner to forget about it. Mr. Pagano also advised those present to stop such statements and to drop the issue because he did not want Respondent's Home Office to know. Thus, although these remarks were admitted to by those involved, Respondent's Employee Relations Office had no record of the incident when it occurred.

Soon after this meeting, Mr. Pagano transferred Mr. Sterling and promoted Mr. Cividanes to Field Manager. Mr. Cividanes them became Petitioner's supervisor.

Soon after Mr. Cividanes became Manager, Petitioner became the recipient of close monitoring by Mr. Cividanes and Mr. Pagano and the recipient of disciplinary write-ups.

On October 2, 1995, soon after Mr. Cividanes became Petitioner's Manager, Mr. Cividanes issued a letter of warning to Petitioner. This unjustified letter was issued because Petitioner had complained about Mr. Cividanes approximately one month before. Petitioner had never before been written up or warned in a disciplinary sense.

On October 14, 1996, Columbus Day, Petitioner reported to work. He telephoned Mr. Cividanes to ask if he was scheduled to work that day. Mr. Cividanes replied that he knew that Petitioner was to be at work that day because he gives all black employees the day off on Martin Luther King Day and gives all Caucasian employees the day off on Columbus Day. Columbus Day and Martin Luther King Day are split holidays. An employee works on one, not the other. The Field Manager has final say on which day off the employee gets. Petitioner, in fact, worked Columbus Day, not Martin Luther King Day. Petitioner believed this practice of giving days off by race is discriminatory and motivated by no legitimate reason.

In October 1996, Petitioner was required to request leave because of his grandfather's death. Petitioner's grandfather resided in Jamaica and Petitioner was required to make overseas funeral arrangements. Petitioner required more than the three (3) day bereavement leave policy. Petitioner sought to receive additional days by changing his vacation. Although Caucasian employees, such as Mr. Nappi,

were routinely granted such time off, Mr. Pagano and Mr. Cividanes refused to approve Petitioner's request. Petitioner had to contact Sharon Symeon of Respondent's Employee Relations Office in order to obtain additional days. Petitioner obtained the additional days and left for Jamaica on October 17th and returned on or about October 23rd.

Petitioner was berated by Mr. Pagano for calling the Employee Relations Office; although Mr. Cividanes had told him to do so. Petitioner believed that these actions were on account of discrimination and retaliation.

On or about October 23, 1996, upon Petitioner's return from the funeral, Mr. Pagano expressed his unhappiness with Petitioner's job performance and stated that "three black guys in Brooklyn" were not going to let him lose his job. At this time, there were no Caucasian Customer Service Representatives assigned to Brooklyn. Petitioner found this reference to be derogatory and discriminatory.

On November 5, 1996, Petitioner contacted Mr. Cividanes to advise him that he was depressed, not feeling well and would not be at work. Petitioner could not eat and suffered from sexual dysfunction. Mr. Cividanes stated that Petitioner would have to report nonetheless. A short time later, Mr. Pagano called Petitioner and advised him that he required a doctor's note for the day's absence. Mr. Pagano also instructed Petitioner to report to him the following day. Petitioner advised Mr. Pagano that he was depressed, taking stomach medication and had high blood pressure. Petitioner, thereafter, learned that Respondent does not require a doctor's note based upon a one day's absence by calling Sharon Symeon on the same day.

On November 6, 1996, Petitioner received a disciplinary memo from Mr. Cividanes, dated November 4,

1996, which threatened the termination of Petitioner's employment, because Petitioner had allegedly "left a machine down" without repairing a machine. This had occurred because Petitioner had left the country to attend his grandfather's funeral. Petitioner did not fail to follow-up. He had ordered the parts, but was out of the country and unable to repair the machine until he returned. The disciplinary memo made reference to complaints from customers. Petitioner was never advised of any such complaints. Petitioner, again, mentioned that he had contacted the Employee Assistance Program and had seen a counselor. Petitioner believed that this letter was retaliatory.

On November 7, 1996, Petitioner wrote a letter to Murray Martin, President of Respondent, and to Ms. Symeon of Employee Relations, complaining about the discriminatory and retaliatory work environment to which he was being subjected. Petitioner wrote this letter after speaking to Ms. Symeon, who advised him to write it.

On November 18, 1996, Lisa Boff, the Manager of Human Resources, sent a letter to Petitioner acknowledging receipt of his November 7, 1996 letter.

Messrs. Cividanes and Pagano, with Respondent's acquiescence, routinely assigned employees in a racially segregated manner, having no relation to business needs. They have routinely insured that all black employees, including Petitioner, work in Brooklyn; that all Caucasian employees work in Queens and that all Hispanic employees work in the Bronx, all boroughs of New York City which are part of the Queens District Office.

Whenever Petitioner sought a transfer to Long Island or the Borough of Queens, even when there was an opening, Respondent would select someone of the same race. Members

of one race were replaced by someone of the same race. Petitioner routinely requested to be transferred to the Huntington District Office, which is comprised of an overwhelming number of Caucasians. Respondent and its agents, including Messrs. Cividanes and Pagano, routinely denied Petitioner's requests, while appointing less senior Caucasian employees to the Huntington District, including Tom D'Onofrio. A customer Service Representative's residence is a factor to be considered in assigning employees.

Because of the foregoing, Petitioner became increasingly depressed, anxious and began experiencing stress related symptoms. He could not eat, sleep and had difficulty functioning and concentrating. He just wanted to stay in bed. He also suffered crying spells and sexual dysfunction.

As a result, Petitioner went to Employee Assistance and was referred to Laurence Eisenberg, Psychotherapist. Dr. Eisenberg recommended that Petitioner not go back to work. He found Petitioner to be suffering from major depression, not delusional, and suggested a psychiatric referral. He also found Petitioner to be incurring sleep, eating and sexual disturbances.

On November 8, 1996, Petitioner was required to go on short term and then long term disability leave. He advised Mr. Cividanes that he had to go on disability because of stress. Dr. Eisenberg referred Petitioner to Carlton Blake, M.D., a Psychiatrist. Petitioner continued to consult with Dr. Blake on a regular basis. Petitioner was placed on medication for depression. Dr. Blake advised Petitioner that he suffered from Major Depression, Anxiety and Hypertension, all of which were held to be related to Petitioner's employment environment. Dr. Blake also indicated that Petitioner had bipolar disorder. During the time that he spent on disability,

Petitioner received several letters from Respondent. These letters approved and extended Petitioner's disability leave.

On March 10, 1997, Petitioner, with medical documentation, wrote a letter to Respondent informing it that he was ready to return to work, with reasonable accommodation, including, but not limited to, a reduction in work hours and a change in work location to the Huntington Office so that he would not have to return to the same stressful supervision. Petitioner specifically referred to his rights under the Americans with Disabilities Act.

Dr. Blake furnished a report to Respondent dated March 14, 1997, in which he reiterated that Petitioner, upon his return to work, should be assigned to a different division.

On May 29, 1997, Petitioner filed his first charge of discrimination against Respondent with the State Division of Human Rights.

Respondent ignored Petitioner's request for reasonable accommodation and Petitioner had to remain on disability leave through June 2, 1997, shortly after, Petitioner filed his first Charge of Discrimination with the State Division of Human Rights and the Equal Employment Opportunity Commission.

Meanwhile, Respondent continued forwarding letters to Petitioner concerning his disability leave.

Upon Petitioner's return to work on June 2, 1997, he returned to the Queens District Office and was assigned to the Borough of Queens, after Respondent had failed to reasonably accommodate him in the manner requested by Dr. Blake. This occurred after Respondent and its agents refused Petitioner's doctor's request for a transfer to the Huntington District away from the Queens District.

From that time on, Respondent and its agents engaged in a continued pattern of discrimination against Petitioner and further began retaliating against him because he had filed charges of discrimination. From the time that Petitioner returned to work in June, 1997, Respondent and its agents, especially Mr. Pagano, subjected Petitioner to differing treatment by continuously monitoring him and telling him "If you don't like working here, you should leave and leave now."

In June, 1997, Petitioner requested to take three (3) weeks vacation during December, 1997. Mr. Pagano denied Petitioner's request, despite the fact that such requests had routinely been granted to Caucasian employees in the past. Petitioner had taken three (3) weeks of vacation in the past. December was considered a light workload month. Petitioner considered Mr. Pagano's denial to be retaliatory.

On September 26, 1997, Petitioner wrote a letter to Murray Martin, President of Respondent, complaining about his treatment.

On January 12, 1998, Mr. Pagano advised Petitioner that he would be "rotated" to the Bronx. No other employee was rotated in this fashion. Petitioner had never heard of being "rotated" and was never before required to help out in another borough. Petitioner was, therefore, required to go to the Bronx on a daily basis for a period of time, despite the great distance from his residence and his disability. Other Customer Service Representatives lived closer. Petitioner believed that this action was due to his race, disability and was retaliatory.

Petitioner started having renewed symptoms of depression. He consulted Dr. Blake.

On January 16, 1998, Petitioner was again compelled to take disability leave because of the discriminatory and hostile work environment. Dr. Blake, in support of Petitioner's application for disability benefits, supplied a report corroborating Petitioner's condition and inability to work.

While on leave, Petitioner again received several letters from Respondent approving his leave. Respondent also regularly called Petitioner to inquire of his health. Petitioner also went on long term disability with Respondent's approval.

On January 27, 1998, Petitioner filed his second Charge of Discrimination/Reprisal against Respondent with the State Division of Human Rights.

In July, 1998, Petitioner advised Respondent that he was ready to return to work. However, Respondent refused to act on the request. In August, 1998, Petitioner's physician notified Respondent that Petitioner would return to work on August 17, 1998, with reasonable accommodation. Petitioner was advised by Dr. Blake to return for four (4) hours per day until he was able to work full-time. Petitioner was also advised to transfer to Huntington in order to alleviate the stressful environment, which was causing Petitioner's medical problems.

Respondent's disability department also through Petitioner should have been transferred. Dr. Patel, a physician hired by Respondent to review Petitioner's case, also believed, as early as March 18, 1997, that Petitioner should return to work at a different site. Dr. Patel also found Petitioner to be suffered from a "significant medical impairment." Respondent's disability records department also found Petitioner to be suffered from "Major depressive disorder single episode with psychotic features."

Respondent's disability office had ongoing dialogue with Dr. Blake and Petitioner while Petitioner was on disability leave.

On August 17, 1998, after speaking to Respondent's disability office, Petitioner appeared for work, with a doctor's note, pursuant to normal procedure and was threatened, in a hostile and offensive manner, by among others, Mr. Pagano, Mr. Cividanes and a representative of Employee Relations. Petitioner gave the note to Mr. Cividanes and was told that he should take back the documentation requesting accommodation and leave Respondent's property immediately. Petitioner believed that these actions constituted race and disability discrimination and were retaliatory.

In an undated letter, around this time, Lisa Boff, Manager OE&D Training and Diversity, advised Petitioner that he was not to report without approval; that he was not guaranteed a position upon his release to return and that there were currently no Customer Service Representative openings in Queens, Huntington or New York City. Ms. Boff further stated that Respondent did not have a position within the restrictions requested. Everyone else returning from long term disability came back to the same job, such as Peter Brownbill, Sam Soto and Bob Nappi.

On August 24, 1998, Dr. Blake advised Respondent that Petitioner could return to work without reasonable accommodation. Respondent still refused to permit Petitioner to return to work. On August 26, 1998, Petitioner wrote a letter to the President of Respondent in which he complained about Respondent's failure to permit him to return. Petitioner never got a response.

On August 28, 1998, Petitioner wrote another letter to Respondent addressing his efforts to go to Huntington.

During the same period of time, while Petitioner was being advised there were no opening, Respondent was running advertisements in local newspapers looking for employees to fill positions for which Petitioner was qualified in the Huntington District, including one position for Service Technician, which was filled by a Caucasian.

During this time, Petitioner was completing transfer applications and responded to the advertisements, but did not receive any transfers. There were no personal reasons, including child care, preventing Petitioner from accepting a transfer to the Huntington District. Petitioner was qualified for all these positions, after having worked for Respondent for ten (10) years. Petitioner even wished to consider a sales position. Petitioner believed Respondent's failure to offer him any of these positions was discriminatory and retaliatory.

On September 4, 1998, Petitioner was advised by Ms. Boff that he was being placed on leave without pay for two (2) months. Ms. Boff further advised Petitioner that he had two (2) months within which to find a position within Respondent or be terminated. This was later extended to December 31, 1998.

In the beginning of December, 1998, Petitioner returned to work with Respondent in the Huntington District after finally being offered a position.

Mr. Pagano retired in February, 1999. Petitioner then reported to Chris Owens.

Dr. Blake, Petitioner's treating Psychiatrist and the Psychiatrist whom Petitioner designated as an expert died after he was deposed on February 8, 2000. Excerpts of this deposition were read to the jury. Petitioner had been Dr. Blake's patient since November, 1996. Petitioner complained that he was depressed and talked about loss of appetite,

inability to sleep and frequent nightmares and crying spells. He also suffered from loss of self-esteem, low energy level, chronic tiredness and poor concentration. These symptoms continued over a course of time. Petitioner was upset over his job stresses.

Dr. Blake diagnosed Petitioner as suffering from "major depression with psychotic features." Dr. Blake found Petitioner to be "barely functional." Dr. Blake then administered "antidepressant and antipsychotic drugs." This medication, said the doctor, doesn't work for everybody. Petitioner's medication was constantly adjusted. While the medications help; symptoms do not disappear overnight. There are variables. Stress, said Dr. Blake, is a variable factor, that you cannot always control, even with medication. Levels of medication have to be increased. Dr. Blake felt very strongly that Petitioner should return to a different location. Dr. Blake further believed that Petitioner "should not be at work." Over time, Petitioner also developed bipolar disorder.

B. Proceedings Below

Petitioner brought this action alleging that his employer, Respondent, Pitney Bowes Copier Systems, a division of Pitney Bowes, Inc., had violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, under the theories of racial discrimination and retaliation and the Americans with Disabilities Act, 42 U.S.C. §12112(a) ("ADA"). Petitioner also asserted related claims under the New York State Human Rights Law, N.Y. Executive Law §296 *et seq.*.

A trial by jury of the issues commenced on January 14, 2002 before the Honorable William D. Wall, United States Magistrate Judge. After Petitioner rested on January

16, 2002, Respondent moved for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a)(1). Petitioner opposed the motion.

After hearing extensive arguments from both sides, the District Court granted Respondent's motion and the trial terminated prior to Respondent's presentation of its case. In doing so, the District Court concluded (1) that Petitioner does not suffer from a disability as that term is defined under the ADA or the New York State Executive Law; (2) that Respondent reasonably accommodated all of Petitioner's requests related to his depression; (3) that Petitioner suffered not adverse employment action because of his alleged disability; (4) that Petitioner's claim of race discrimination failed as a matter of law because it was based solely on comments that were wither made by a coworker or were isolated remarks and because there was no causal connection between the alleged remarks and any discriminatory action; and (5) that Petitioner's retaliation claim failed because he did not suffer any adverse employment action and, even assuming arguendo, that he had, Petitioner failed to show any causal relation between that action and the alleged racist remarks. A Judgment dated January 25, 2002 followed.

Believing that the granting of the Rule 50(a)(1) motion was erroneous, both as to issues of law and fact, Petitioner appealed to the United States Court of Appeals for the Second Circuit. In a Summary Order dated December 20, 2002, the United States Court of Appeals for the Second Circuit affirmed the Judgment of the District Court for reasons relied upon by the District Court.

This petition for writ of certiorari follows because the rulings below were inconsistent with decisions of this Court and other Courts of Appeal.

REASONS FOR GRANTING THE WRIT

1. The Finding of the Courts below That Petitioner's Claim Pursuant to the Americans with Disabilities Act Failed as a Matter of Law Was Inconsistent with Decisions of this Court and of Other United States Courts of Appeal.

Respondent argued that Petitioner could not establish that he suffered from a disability under the ADA. Respondent's main contention on this issue was that Petitioner did not suffer from an impairment which substantially limited him in one or more major life activities, including the ability to work.

More specifically, with reference to this argument, Respondent asserted that there was "four separate reasons" why Petitioner could not establish that his medical impairment substantially limited one or more major life activities. The four reasons, according to Respondent, included this Court's decision in *Toyota v. Williams*, 2002 US LEXIS 400 (January 8, 2002), which was decided days prior to the trial herein. According to Respondent, Petitioner could not establish, under the *Toyota* case, that he has "an impairment that either prevents or severely restricts [him] from doing activities that are of central importance to meet daily lives," including household chores, bathing and brushing one's teeth.

Respondent also cited *Sutton v. United Airlines*, 527 U.S. 471 (1999) to support its argument that in order to be substantiality limited in the major life activity of working, Petitioner must be unable to work in a broad class of jobs, rather than a specific job. Furthermore, Respondent asserted that an impairment that is correctable by medication is not a disability under the ADA. Finally, Respondent asserted that Petitioner could not establish a disability because of the

alleged "temporary nature" of that disability. The District Court agreed with Respondent, concluding only that "it is clear that [Petitioner's] depression does not preclude him from working in his chosen profession." The Court of Appeals agreed.

Under the ADA, a disabled person is defined as "any person who '(i) has a physical impairment or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment; or (iii) is regarded as having such an impairment.'" 29 C.F.R. §1615.203(a), *Ryan v. Grae & Rybicki P.C.*, 135 F.3d 867-870 (2d Cir. 1998). Petitioner submits that he established all three standards.

A. Petitioner Has a Physical or Mental Impairment Which Substantially Limits One or More Major Life Activities

The ADA and its accompanying regulations define mental impairment as

> "Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities." 29 C.F.R. §1630.2(h)(2).

Petitioner established that, at all relevant times, he suffered from major depression, anxiety and hypertension. Respondent's own Dr. Patel found Petitioner to be suffering from "a significant medical impairment." Respondent's disability records department found Petitioner to be suffering from "Major depressive disorder single episode with psychotic features." Such conditions clearly constituted a "mental impairment" for purposes of the ADA. *Mescall v.*

Marra, 49 F.Supp.2d 365, 372 (S.D.N.Y. 1999) and Respondent did not argue otherwise.

However, Respondent asserted, as we have noted, that Petitioner's disability did not substantially limit him in order or more major life activities. The District Court, relying exclusively on the major life activity of working, agreed.

We shall now discuss each issue raised by Respondent and adopted by the courts below. Firstly, Petitioner submits that the *Toyota* case should not have been interpreted in the strict manner that Respondent suggested. The *Toyota* case involved an individual who claimed that her disability was carpal tunnel syndrome. She claimed that, as a result of that carpal tunnel syndrome, she could not perform the major life activity of performing manual tasks, clearly a physical impairment. No mental disability was claimed in that case.

This Court, in interpreting the applicability of the ADA to her impairment, focused exclusively and dispositively on her ability to perform the major life activity of manual tasks, which is what the claim was. The Court held that Petitioner therein could perform daily manual tasks such a brushing her teeth and other items of personal hygiene. Therefore, the Court held that Petitioner's argument, that she could not perform manual tasks in her job was not convincing.

Petitioner herein does not believe that the situation in *Toyota* is analogous to the case at bar. The claim herein was not of a physical impairment. The claim was not one of inability to perform manual tasks. The claim herein was one of mental impairment. This Court did not state that from here on in, whenever one evaluates a claim of disability under the ADA, that one's ability to brush his/her teeth is dispositive to determining whether or not a disability exists under the ADA.

The *Toyota* case was very fact specific and should only be considered on those facts.

In the case at bar, Petitioner claimed that he could not only do the major life activity of working, but he also claimed that his mental impairment rendered him unable to function at any level in daily life, which goes beyond his ability to perform only manual tasks.

The record indicates that Petitioner could not concentrate, that he had continual nightmares and crying spells, that he could not eat properly, that he suffered sexual dysfunction and suffered from sleep impairment. All of these can be construed to be daily chores. In the context of Petitioner's claim, rather than focusing in on his ability to brush his teeth, we had to focus on his ability to perform other daily chores or daily functions of the type just mentioned and how Petitioner's disability impaired him from performing those daily activities.

The record indicates that Dr. Blake, as all as Respondent's own disability case files indicated that during the relevant period of time that Petitioner could not function in daily life at all. That went beyond Petitioner's ability to perform the life activity of working, which the courts below exclusively considered. Nonetheless, the record sufficiently established that Petitioner, during the time that he was not reasonably accommodated, was unable to perform any job at Respondent. Ms. Romanello's own notes, as well as Petitioner's testimony and Dr. Blake's testimony corroborated this contention.

There is no question that this Court and other Courts of Appeal have concluded that sleep impairment, sexual dysfunction, poor concentration and caring for one's self (i.e., inability to eat, continued crying spells, continual psychotic

nightmares and remaining in bed most of the time) are major life activities. *See, e.g., Bragdon v. Abbott*, 118 S.Ct. 2196 (1998); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635 (2d Cir. 1998); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1995).

This Court's holding in *Toyota* should not be construed to render this conclusion any different. Whether Petitioner faced substantial limitations in his work is irrelevant to whether his limitations in other major life activities qualified him as disabled under the ADA. All of the limitations cited by Petitioner are of central importance to meet daily lives, all of which Petitioner was unable to do. The courts below gave no reason why these activities are not significant in the life of the average person.

The next issue is whether Petitioner's condition was controllable by medication. Dr. Blake in his transcript, indicated that Petitioner's condition is such that it is not always controllable by medication. There may be times it is controllable, but there are other times that it is not controllable and Dr. Blake indicated that one of the time that it is not controllable by medication is when Petitioner has a stressor or is subjected to a stressor. Dr. Blake indicated that not only an individual with depression, but one who has the subsequent diagnosis of bipolar disorder suffers from mood swings, alternate period of euphoria, and alternate periods of depression. One cannot always predict when these episodes will occur.

Dr. Blake indicated that even with medication, having someone being subjected to a stressor or to a stressful environment can precipitate uncontrollable depression or uncontrollable bipolar disorder. In Petitioner's case, there were frequent periods of time that even with medication his

condition was not controlled. Dr. Blake stated that this is a situation that Petitioner will always be faced with.

Furthermore, the record indicates that Dr. Blake had to constantly change Petitioner's medication. Dr. Blake indicated the one has to change medication or increase the dosage of medication when the then currently-prescribed dosage or medication is not sufficient. When Dr. Blake was treating Petitioner, the dosage of the medication as well as the medication itself, always had to be changed. Clearly, Petitioner's condition was not controllable by medication.

Finally, Petitioner's condition was not merely temporary. Through stressors and medication problems, the condition would also reappear.

B. Respondent Regarded Petitioner as Disabled and There Is a Record of Such Disability

Under the ADA, the term disability also means being regarded as having a disability or where there is a record of such disability. Thus, even if Petitioner could not establish that he suffered from an impairment which substantially limited him in one or more major life activities, which, of course, he does not concede, he could still have succeeded if he established that Respondent regarded him as being disabled or if there is a record of such disability. 42 U.S.C. §12102(2)(c).

The record herein indicated that Respondent regarded Petitioner as disabled, because it perceived him as being substantially limited in his ability to work. The relevant regulation describing this standard is 29 C.F.R. §1620.2(1). It states, as follows:

> "Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit a major life activity but is treated by a covered entity as constituting such limitations;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined [by the EEOC regulations] but is treated by a covered entity as having a substantially limited impairment." *See also, Reeves v. Johnson Control World Services Inc.*, 140 F.3d 144, 151 (2d Cir. 1998).

In the case at bar, it is clear that Petitioner established that Respondent classified and perceived Petitioner as being substantially limited in his ability to work because of his major depression and related conditions.

The record was replete with supporting facts. Respondent approved Petitioner's disability leave requests, obviously finding him unable to work. Respondent repeatedly rebuffed Petitioner's efforts to return to work, finding that there was no work available under his requested restrictions. Respondent's perception of Petitioner as being substantially limited in his ability to work culminated in Lisa Boff's undated letter, wherein Petitioner was advised not to report without approval and that there were no positions available within the accommodation that Petitioner had requested and in Lisa Boff's September 4, 1998 letter wherein Respondent placed Petitioner on leave without pay, despite Petitioner's

expressed ability and willingness to return. Ms. Romanello's testimony confirmed that Petitioner was doing poorly.

Clearly, Respondent refused to permit Petitioner to return, although the symptoms of his condition no longer prevented him from returning and despite his request to return.

The record was, thus, replete with facts indicating that Respondent maintained a record and regarded Petitioner as being disabled. Under these circumstances as well, Petitioner met the standards of disability under the ADA.

C. Petitioner is a "Qualified Individual" Within the Meaning Of The ADA

Respondent next contended that, even if Petitioner has a disability under the ADA, he is not a "qualified individual" or a person with a disability who" with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires." Petitioner, according to Respondent, could not do so because he sought an accommodation that Respondent had no legal obligation to provide and that there was no accommodation available. The courts below agreed.

In furtherance of this discussion, it must be noted that the failure to make reasonable accommodation for one who is disabled can constitute discrimination. *Kahn v. Chase Manhattan Bank*, 91 F.3d 383, 384 (2d Cir. 1996). 42 U.S.C. §12112(b)(5)(A) provides that the term "discriminate" includes not making reasonable accommodations to the known physical or mental limitation or an otherwise qualified individual with a disability who is an applicant or employee. The term "reasonable accommodation" can include:

> "job restructuring, part-time or modified work schedules, **reassignment to a vacant position**, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examination, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." [Emphasis added]

The record reveals that Petitioner, believing that he was capable of performing the essential functions of his position, did request reassignment to a vacant position -- a reasonable accommodation under the ADA and one which an employer is legally obligated to provide.

We have seen that Petitioner, time and time again, with medical documentation, sought a reassignment to the Huntington District, to be closer to his home and removed from Messrs. Cividanes and Pagano. At the same time, vacancies clearly existed. This requested transfer went beyond a mere request to change supervisors that Respondent wrongly emphasized was the request herein. In 1998, there were vacancies in the Huntington District Office, all of which Petitioner indicated an interest in and all of which he was qualified for.

In any case, decisions such as *Potter v. Xerox Corp.*, 88 F.Supp.2d 109 (W.D.N.Y. 2000) and *Kennedy v. Dresser Rand Co.*, 193 F.3d 120 (2d Cir. 1999), are clearly not dispositive. The Second Circuit in *Kennedy* rejected any notion that there is a per se rule that the replacement of a supervisor cannot be a reasonable accommodation. *Id.* at 122. Instead, the court noted that "the question of whether a requested accommodation is a reasonable one must be evaluated on a case-by-case basis." *Id.* The court continued:

> "A per se rule stating that the replacement of a supervisor can never be a reasonable accommodation is therefore inconsistent with our ADA case law." *Id.*

The court did indicate that a Petitioner must still overcome a presumption that a request to change supervisors is unreasonable. Petitioner respectfully submits that he had sufficiently done so to withstand the Rule 50(a)(1) motion.

For example, Petitioner could have been transferred to Huntington, as he ultimately was, without any employer hardship, especially since Respondent already had a policy which considered a Customer Service Representative's residence when making assignments. *See, Parisi v. Coca Cola Bottling Co.*, 995 F.Supp. 298 (E.D.N.Y. 1998).

Moreover, Dr. Patel, as we have seen, suggested that Petitioner be transferred to Huntington. Ms. Romanello thought it would be in Petitioner's best interests to be transferred. Yet, Respondent disregarded that opinion and continued not only not to place Petitioner in Huntington, but to bar him from returning to work.

All those reasons, tied in with the fact that there were vacancies, has to lead to the conclusion that Respondent, under the facts of this case, should have reasonably accommodated Petitioner by changing his work location and, therefore, his supervisor.

The courts below also concluded that Respondent has sufficiently reasonably accommodated all of Petitioner's requests related to his depression. Based on the record, this was surely not the case. It if were, how did Petitioner wind up being instructed not to report, being told that there were no positions available within the restrictions requested and ultimately being placed on leave without pay and threatened

with termination, all while positions were being advertised in the Huntington District?

D. Petitioner Suffered Adverse Employment Actions Because of His Disability

Contrary to the conclusion of the courts below, Petitioner did suffer adverse employment actions because of his disability. The obligation to provide a reasonable accommodation applies to all aspects of employment and an employer cannot deny an employment opportunity to a qualified individual because of the need to provide reasonable accommodation. Respondent's contention that Petitioner did not suffer any adverse employment action bears no importance with reference to Petitioner's reasonable accommodation argument.

To the extent that Petitioner must show an adverse employment action, there can be no question that he did. In any case, this a fact specific argument which should have gone to the jury.

In *Galadya v. NYC Board of Education*, 202 F.3d 636 (2d Cir. 2000), the Second Circuit recognized that "less flagrant reprisals" than termination or a reduction in wages and benefits may be sufficient. *Id.* at 640. The key, said the court, is to determine whether the alleged action creates a "materially significant disadvantage." *Id.* at 649; *see also*, *Campbell v. Grayline Air Shuttle Inc.*, 930 F.Supp. 794 (E.D.N.Y. 1996). In *Campbell*, the court, citing *Medwid v. Baker*, 752 F.Supp. 125, 136-37 (S.D.N.Y. 1990), also noted that "a material adverse change is one that has an attendant negative result, one must look at the totality of the circumstances. *Campbell*, *supra*. at 802-803.

In *Morris v. Lindau*, 496 F.3d 102, 110 (2d Cir. 1999), the Second Circuit also noted lesser actions may be

considered adverse employment actions, citing as examples" negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process teacher's insurance forms, transfer from library to classroom teaching as an alleged demotion, and an assignment to classroom on fifth floor which aggravated teacher's physical disabilities." *Id.* In addition, the Second Circuit has held that adverse employment actions are not limited to "pecuniary emoluments." *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 791 (2d Cir. 1997).

An adverse employment action has been further defined as one which "affects the terms, privileges, duration or conditions of employment." *Dortz v. City of New York*, 904 F.Supp. 127, 155 (S.D.N.Y. 1995), *Pazamickas v. NYS Office of Mental Retardation*, 963 F.Supp. 190 (N.D.N.Y. 1997). In these cases, actions such as those claimed by Petitioner were deemed to be adverse employment actions. For example, in *Pazamickas*, *supra*. at 195, actions such as the denial of a request for time off, the denial of a request to hold a position open and the placement of a reprimand in a personnel file were all considered to be adverse employment actions. Therefore, Petitioner did suffer adverse employment actions including Respondent's refusal to permit him to return to work in August, 1998 following his long term disability leave of absence. There can, therefore, be no doubt that the Rule 50(a)(1) motion should not have been granted with respect to the ADA claim.

2. The Finding of the Courts below That Petitioner's Claim of Race Discrimination Failed as a Matter of Law Was Inconsistent with Decisions of this Court and of Other United States Courts of Appeal.

The courts below also upheld Respondent's Rule 50(a)(1) motion with reference to the race claim.

In order to establish a *prima facie* case of race discrimination, Petitioner must show (1) that he belongs to a protected class; (2) that he was performing his duties satisfactorily; (3) that he suffered adverse action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination on the basis of his membership in that class. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

The issue is element four. Petitioner believes that he sufficiently established that element. The record reveals that eventually Petitioner's complaint about racial remarks was referred to Mr. Pagano. Petitioner advised Mr. Pagano not only of the initial remark, but of Mr. Cividanes' indifference or condonation of that remark. Rather than disciplining Mr. Cividanes, Mr. Pagano promoted Mr. Cividanes into the job of field manager. Right after that Mr. Cividanes became Petitioner's immediate supervisor. There was no indication there was ever a problem between Petitioner and anyone at Pitney Bowes until Mr. Cividanes became his immediate supervisor and after his racial remarks.

Afterwards, there is one incident after the other, as alleged by Petitioner. We also have the remarks. We start having, according to Petitioner's testimony, the remark about the split holidays. We start having the remark from Mr. Pagano about the three black guys in Brooklyn. These remarks were more than stray, but, instead, were directly tied to both Mr. Cividanes and Mr. Pagano.

Contrary to the District Court's conclusion, there was also no doubt that assignments were done on racial lines. The Rule 50(a)(1) motion should have been denied on Petitioner's race claim.

3. The Finding of the Court below That Petitioner's Claim of Retaliation Failed as a Matter of Law Was Inconsistent with Decisions of this Court and of Other United States Courts of Appeal.

The District Court also erred in granting the Rule 50(a)(1) motion with respect to the retaliation claim. To state a claim for discriminatory retaliation, a Petitioner must show (1) participation in a protected activity known to the Respondent; (2) an employment action disadvantaging the Petitioner; and (3) a causal connection between the protected activity and the adverse employment action. *Querry v. Messar*, 14 F.Supp.2d 437, 450 (S.D.N.Y. 1998).

In the within action, Petitioner sufficiently established a claim. As we have already discussed, Petitioner did suffer an adverse employment action. Moreover, Petitioner has sufficiently established a causal connection. The record revealed that Petitioner's problems started within one month after he complained about the Nappi remark and Mr. Cividanes remarks. Each time after that, that Petitioner complained, his complaints were met by increased retaliation.

This Court should grant the within Petition in order to review, clarify and reconcile the decisions of the courts below with the standards that this Court and Courts of Appeal have established.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 02-7197

[Filed December 20, 2002]

EDSON MAITLAND,
Plaintiff-Appellant,

v.

PITNEY BOWES COPIER SYSTEMS, a division of Pitney Bowes, Inc,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York (Wall, M. J.)

JUDGES:
PRESENT: HON. WILFRED FEINBERG, HON. THOMAS J. MESKILL, HON. GUIDO CALABRESI, Circuit Judges.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

Edson Maitland ("Maitland" or "Appellant") appeals from a judgment of the United States District Court for the Eastern District of New York (Wall, *Magistrate Judge*),[1] in favor of Pitney Bowes Copier Systems ("Pitney Bowes" or "Appellee"). Maitland had sued Pitney Bowes, his employer, alleging that the company discriminated and retaliated against him on the basis of his race (African American) and disability (depression), in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. ("Title VII"), the Americans with Disabilities Act, 42 U.S.C. § 12112(a) (the "ADA"), and New York Human Rights Law, N.Y. Exec. Law § 296 *et seq*. A jury trial began and, at the close of Maitland's case, Pitney Bowes made a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a)(1).[2]

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[1] The parties consented to a trial before a United States magistrate judge. *See* 28 U.S.C. § 636 (c)(1).

[2] Federal Rule of Civil Procedure 50(a)(1) states as follows:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim . . . that cannot under the controlling law be maintained . . . without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1).

After hearing extensive oral argument, the court granted Pitney Bowes's motion. The court concluded (1) that Maitland "does not suffer from a disability as that term is defined under the ADA or the New York Executive Law"; (2) that "Pitney Bowes reasonably accommodated all of [Maitland's] requests related to his depression"; (3) that Maitland "suffered no adverse employment action because of his alleged disability; (4) that Maitland's claim of race discrimination failed as a matter of law because it was based solely on comments that were either made by a coworker or were isolated remarks, and because there was "no causal connection between the alleged remarks and any discriminatory actions"; and (5) that Maitland's retaliation claim failed because "he did not suffer any adverse employment action," and that even assuming arguendo that he had, Maitland failed to show any causal relation between that action and the alleged racist remarks. This appeal followed.

"In examining a defendant's motion for judgment as a matter of law pursuant to [Fed. R. Civ. P. 50(a)(1)], the district court 'must view the evidence in a light most favorable to the nonmovant and grant that party every reasonable inference that the jury might have drawn in its favor.' " *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 79 (2d Cir. 1997) (quoting *Purgess v. Sharrock*, 33 F.3d 134, 140 (2d Cir. 1994)). "A district court may grant a judgment as a matter of law pursuant to this rule only if no reasonable jury could find for the non-moving party." *Stagl*, 117 F.3d 76 at 79 (citing *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 14 (2d Cir. 1993)). We review de novo a district court's grant of judgment as a matter of law, *Harris v. Niagara Mohawk Power Corp.*, 252 F.3d 592, 597 (2d Cir. 2001), applying the same standard that the district court was required to apply.

LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 429 (2d Cir. 1995).

The ADA prohibits discrimination against any "qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). "To make out a prima facie case under the ADA, a plaintiff must establish that: (1) his employer is subject to the ADA; (2) he was disabled within the meaning of the ADA; (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and (4) he suffered adverse employment action because of his disability." *Giordano v. City of New York*, 274 F.3d 740, 747 (2d Cir. 2001).

The Act defines a disability as

> (A) a physical or mental impairment that substantially limits one or more of the major life activities ...;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

Based on a de novo review of the record, we agree that Appellant's ADA claim fails as a matter of law for substantially the reasons given by the district court. We find that Appellant's Title VII claims fail as a matter of law as well. As the district court correctly noted, the two racist comments alleged by the Appellant cannot, in this case, establish a claim of race discrimination because, "assuming

they were made, they were either made by a coworker or were isolated remarks." Moreover, Appellant has presented no evidence to establish a causal connection between the alleged remarks and any adverse employment action. Indeed, the record lacks evidence of any adverse employment action causally related to the remarks or, as would be necessary to support Appellant's retaliation claim, to his complaints about the remarks.

We have considered all of Appellant's other claims and find them meritless. We therefore AFFIRM the judgment of the district court.

For the Court,

ROSEANN B. MACKENCHNIE
Clerk of the Court

by /s/ _____
Lucille Carr

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV 99-0803 (WDW)

[Filed January 25, 2002]

EDSON MAITLAND, Plaintiff,	)
v.	)
PITNEY BOWES COPIER, a division of Pitney Bowes, Inc, Defendant.	)

JUDGMENT

An Order of Hon. William D. Wall, United States Magistrate Judge, having been filed on January 18, 2002, after a jury trial, granting defendants motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 (a) (1), it is

ORDERED AND ADJUDGED that plaintiff take nothing of defendant; and that the defendants motion for judgment as a matter of law is granted.

Dated: Central Islip, New York
January 25, 2002

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ _____
Deputy Clerk

APPENDIX C

EXCERPTED TRANSCRIPT

AFTERNOON SESSION

2:25 p.m.

THE COURT: Have a seat, please.

Before the court is defendant's Rule 50 motion, which was made at the close of two-and a-half days of testimony at the close of the plaintiff's case, claiming on behalf of defendant that there is no legally-sufficient evidentiary basis for a reasonable jury to find for the plaintiff, and in seeking judgment as a matter of law dismissing each of the claims contained in the plaintiff's complaint, with prejudice.

In this action the plaintiff claims that Pitney Bowes violated Title 7 of the Civil Rights Act, the Americans with Disabilities Act, and Article 15 of the New York Executive Law, specifically Sections 296 and 297, by discriminating against him because of his race and because of his alleged disability. Plaintiff also claims that Pitney Bowes retaliated against him for making complaints about discrimination.

It is the court's finding and ruling that based on the review of all of the evidence and the authorities submitted by the parties, that the plaintiff has failed to establish a disability discrimination claim both under the ADA and the New York Executive Law.

The ADA prohibits employers from discriminating against a qualified individual with a disability because of the disability of such individual. To establish his claim of discrimination based upon disability, the plaintiff must show that Pitney Bowes is subject to the Americans with Disabilities Act, which is conceded; that the plaintiff suffers from a disability within the meaning of the ADA; that he performed the essential functions of his job with or without reasonable accommodation; and, four, that the plaintiff suffered an alleged adverse employment action because of his disability.

Plaintiff has not submitted sufficiently credible evidence to support this claim; namely, one, plaintiff does not suffer from a disability as that term is defined under the ADA or the New York Executive Law. Disability is defined under the ADA as a physical or mental impairment which substantially limits one or more of the major life activities of such individual.

To prove that an impairment substantially limits the major life activity of work, plaintiff must show that he is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities, The inability to perform a single particular job does not constitute substantial limitation in a major life activity of working.

In January of 1998 Mr. Maitland transferred to the Huntington District, reporting to the supervisor, Owens. Since that transfer he has not sought a further leave of absence due to depression, and it is clear that his depression does not preclude him from working in his chosen profession.

Plaintiff therefore cannot show that he suffers from an ADA recognized disability.

Two, the plaintiff is not a qualified individual within the meaning of the ADA. Requested transfer to a different supervisor is not considered reasonable under the ADA, and a request to change supervisors is presumed to be unreasonable, and the burden of overcoming that presumption lies with the plaintiff.

Third, Pitney Bowes accommodated all of the plaintiff's requests related to his alleged disability, Even if plaintiff was a qualified person with a disability, Pitney Bowes reasonably accommodated all of his requests related to his depression,

Pitney Bowes extended his leave of absence numerous times. Pitney Bowes extended his unpaid leave of absence twice after he was cleared to return to work. The defendant provided plaintiff with a reduced-hours schedule upon his return from leave of absence in June of 1997. Pitney Bowes assigned plaintiff a Queens territory after he returned from that leave.

And the evidence clearly shows that Pitney Bowes offered plaintiff at least two positions, one in the Huntington District, in which he had expressed interest but ultimately refused, and Pitney Bowes transferred the plaintiff to the first available position to fit his qualifications and skills in the Huntington District that was available after he was cleared to return to work on September of 1998. Thus, the plaintiff's claim that Pitney Bowes somehow failed to provide him the accommodation he requested is at best specious.

Lastly, the plaintiff suffered no adverse employment action because of his alleged disability. To the contrary, the plaintiff received every accommodation that he requested: reduced hours, reassignment to Queens, and transfer to Huntington. In fact, plaintiff was given extraordinary preferential treatment beyond what is required by the Americans with Disabilities Act or under New York Executive Law. Therefore, the court grants the defendant's motion and dismisses the disability discrimination claim.

The Court further finds as a matter of law that plaintiff has failed to prove a claim of race discrimination. The alleged comments by plaintiff's coworkers do not establish a claim of race discrimination because, assuming they were made, they were either made by a coworker or were isolated remarks.

Further, there is no causal connection between the alleged remarks and any discriminatory action, The record is bereft of any evidence indicating an intentional racially discriminatory practice, policy, or act on behalf of Pitney Bowes. Therefore, the court grants the defendant's motion and dismisses the race discrimination claim.

Lastly, the court finds as a matter of law that the plaintiff has failed to prove and establish a retaliation claim. Plaintiff has not established a prima facie claim of retaliation under Title 7 because he did not suffer any adverse employment actions. Even assuming that he did, he cannot show that they were causally related to his complaint about the alleged reference to the word nigger. In other words, saying so doesn't make it so.

A review of all of the evidence reveals that not only did Pitney Bowes not retaliate against the plaintiff, it complied with virtually all of his requests. Plaintiff's primary allegations of retaliation were that Pitney Bowes refused to grant more than three days of bereavement leave on the death of his grandfather in October of 1996 even though the record clearly indicates that he did receive the ultimate leave that he requested; that Pitney Bowes refused to provide three consecutive weeks off on December of 1997 even though the plaintiff ultimately received all the time off he requested and received three to four weeks specifically in December that he requested; that Pitney Bowes refused to transfer him to a new territory district even though in fact Pitney Bowes did transfer him to a Queens territory, offered him two transfers that he refused, and ultimately transferred him to the first available position in Huntington, which he currently holds; further, that Pitney Bowes continuously monitored him beginning on June of 1997 while he was on service calls, even though there is no evidence on the record to support that contention.

Further, that Pitney Bowes sent him to cover service calls in the Bronx in January of 1998 and refused to reinstate him to his prior position after he was cleared to return to work on September of 1998 even though his prior position was not available and Pitney Bowes' policy seems not to require such reinstatement.

Based on all of the evidence and the authority cited by the parties, the court finds that Pitney Bowes did not retaliate against the plaintiff. To the contrary, the evidence reveals that Pitney Bowes went out of its way to meet all of plaintiff's concerns, treated him in many cases more favorably than Pitney Bowes' policy required, and at a minimum treated him

at least as well as all other similarly-situated Pitney Bowes employees.

In sum, I think the actions of Pitney Bowes are best reflected in the testimony of Miss Romanello who testified here yesterday afternoon. In response to the following question of Hr. Marshall, she gave the following answer.

"Can you compare the treatment that Mr. Maitland received during both of these disability leaves that you were familiar with to that of any other employees in the Time Out program during your 4-1/2 years?

Answer from Miss Romanello at page 373: "I would like to think that I treated everybody with kindness, compassion, and respect. I have to say that I had a very long-term relationship with Mr. Maitland, and I think if there was an extra mile to go, we went the extra mile for Mr. Maitland."

Therefore, the defendant's motion is granted in its entirety. The plaintiff's case is dismissed.

Thank you.

MR. WOLIN: Thank you, your Honor.

THE COURT: I'm going to bring the jury in, and discharge them and thank them for their service, What I intend to do is just say that the case has been dismissed on legal grounds. I will meet with them afterwards and try to. explain to them the procedures here and what has happened,

but I want to thank them for their three days of service here. Any objection to that?

MR. WOLIN: No, your Honor.

MR. McEVOY: No, your Honor.

THE COURT: Please bring the jury in.

MR. McEVOY: Can you just ask the jurors if they would like to speak to the lawyers.

THE COURT: I'm going to meet with them separately and I will tell them that you would like to meet with them and it is up to them.

MR. McEVOY; Yes. I understand, sir.

THE COURT: I want to compliment all counsel on the presentation of, not only the case but the arguments today. They we are very helpful to me tn arriving at my decision.

MR. WOLIN: Thank you, your Honor.

MR. MCEVOY: Thank you, your Honor.

(Jury in at 2:35 p.m.)

THE COURT: Ladies and gentlemen, I want to advise you that the case has been resolved. The case has been dismissed on legal grounds.

I apologize for keeping you waiting so long, but we did have a lengthy discussion and review of the evidence in this case leading to that decision. But most importantly the parties have asked me, and I join them in that, to thank you profusely for your Jury service here

I know when we selected the jury a couple of weeks ago I mentioned to you that this is one of the fundamental rights that we are fighting to protect right now, and I believe that truly. And I believe that the jury system works, and I believe that the jury system works because of the willingness of people like yourselves to interrupt their daily lives, jobs, personal lives and come here and serve. And I can just tell from the looks on your faces during the last two-and-a-half days that you took this very, very seriously and I can assure you that without your participation we could not have resolved the case.

So I thank you very much. You can return to jury room and I am going to come in and talk to you in just a few minute and answer any questions you might have.

Thank you.

(Jury out at 2:40 p.m.)

THE COURT: I'm going to meet with them briefly and I will relate your request. Do you want to meet with them, too, Mr. Wolin?

MR. WOLIN: I don't think so, your Honor.

THE COURT: Very well. See you in a few minutes,

(There was a pause in the proceedings.)

THE COURT: Just to clarify. I just want it to be clear. I think the thrust of the decision was clear, but in dismissing the discrimination claim: the disability claims were under the New York Executive Law and the ADA. That was clear, right?

MR. McEVOY: Yes, your Honor.

THE COURT: On the basis of reasonable accommodation.

MR. McEVOY: Yes .

MR. WOLIN: Your Honor, to the extent that I have to, I don't think I have to but, I just want to note my official exception on the record, for what it is worth.

THE COURT: Fine. Thank you very much.

(Proceedings concluded at 2:41 p.m.)